

HON'BLE SMT JUSTICE ANIS

SECOND APPEAL No.50 of 2016

JUDGMENT:

This appeal is filed by the appellant-defendant under Section 100 C.P.C. against the judgment and decree dated 09.12.2015 in A.S.No.133 of 2014, passed by III Additional District Judge, Guntur, confirming the judgment and decree dated 28.08.2014 in O.S.No.911 of 2010, passed by III Additional Junior Civil Judge, Guntur.

2. The appellant herein is the defendant in O.S. No.911 of 2010, filed by the plaintiffs for eviction of defendant from the suit schedule property and for damages, whereas the respondents herein are the plaintiffs in the aforesaid suit.

3. For the sake of convenience, the parties are referred to as arrayed in O.S. No.911 of 2010 before the III Additional Junior Civil Judge, Guntur.

4. The plaintiffs filed the suit in O.S.No.911 of 2010 for eviction of the defendant from the suit property, consisting of ground floor on a monthly rent of Rs.2,500/- and later it was enhanced to Rs.3,500/-, on the ground that the plaintiffs' parents are residing along with them and they are of old age and unable to climb the stairs and requested the defendant to vacate the suit property. In spite of repeated requests and in spite of issuing notice, the defendant failed to vacate the

same. On 12.06.2010, the defendant got issued notice by enclosing a demand draft for Rs.3,500/- towards rent for the month of June 2010. The plaintiffs gave a reply notice dated 19.06.2010 terminating the tenancy of defendant and called upon the defendant to vacate the suit property by 31.07.2010 and to handover its vacant possession. Despite receiving the said notice, the defendant failed to vacate the suit property and filed R.C.C.No.26 of 2010 before the Rent Controller, Guntur for deposit of rents. The said R.C.C. was dismissed on the ground that the A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 is not applicable to the suit property. As the defendant failed to vacate the suit property, the plaintiffs filed O.S.No.911 of 2010 for eviction and for damages.

5. In the written statement filed by the defendant, he admitted about taking the suit property on lease originally on a monthly rent of Rs.2,500/- and thereafter, it was enhanced to Rs.3,500/-. The defendant contended that he was paying rents regularly without any default and therefore, he cannot be evicted without following the due process of law. The defendant also contended that the plaintiffs have no *bona fide* requirement of the suit property and the plaintiffs demanded the defendant to vacate the said property with a view to let out the same to third-parties for higher rents. The defendant

admitted about the notice issued by the plaintiffs and reply given by him. According to the defendant, plaintiffs have four independent houses in and around the suit property and there is no need for them to occupy the suit property and finally prayed the Court to dismiss the suit.

6. Basing on the pleadings, the trial Court framed three issues. Before the trial Court, plaintiff No.1 was examined as PW1 and got examined the father of plaintiff No.2 as PW2, and exhibits A1 to A3 were marked on behalf of the plaintiffs. The defendant himself was examined as DW1 and one M.Rangamma was examined as DW2 and got marked exhibits B1 to B22. After considering the oral and documentary evidence and after hearing both sides, the trial Court decreed the suit in favour of the plaintiffs against the defendant evicting the defendant from the schedule property and directed to handover the vacant possession of the schedule property to the plaintiffs within two months from the date of decree. The trial Court also directed the defendant to pay damages for use and occupation of the suit schedule property @ Rs.1,000/- per month from 31.07.2000 till the date of eviction from the schedule property.

7. Aggrieved by the judgment and decree passed by the trial Court, the defendant preferred an appeal in A.S.No.133 of 2014 before III Additional District Judge, Guntur. The first

appellate Court, after perusing the record and after framing three points, dismissed the appeal confirming the judgment and decree made in O.S. No.911 of 2010 dated 28.08.2014. Aggrieved by the concurrent findings of the trial Court as well as the first appellate Court, the appellant-defendant filed the present Second Appeal.

8. Learned counsel for the appellant-defendant formulated the following substantial questions of law for consideration of the Second Appeal:

- 1) Whether the Courts below were justified in ejecting the defendant/appellant herein on perverse findings, which are contradictory to the evidence on record?
- 2) Whether the Courts below were justified in taking into consideration of the legal reply as quit notice under Sec. 106 of the T.P. Act, which is issued by the Advocate under instructions of co-owner i.e., 1st respondent herein without his signature?
- 3) Whether the Courts below were justified in evicting the appellant herein taking into considering the personal use which is after thought after receiving the notice of the appellant wherein the 1st respondent was offered to receive the rent as he failed to receive the same?
- 4) Whether the Courts below were justified in ejecting the appellant herein relying on the reply notice of the co-owner i.e., the 1st respondent herein without consent of the another co-owner i.e., the 2nd respondent herein, who is not deposed anything even in the suit except a formal party in the suit?
- 5) Whether the appellate Court was justified in ejecting the appellant herein without allowing the appellant to raise the ground of validity of the notice under Section 106 of the T.P. Act?

9. Learned counsel for the appellant-defendant contended that the trial Court as well as the first appellate Court dismissed the suit and appeal without appreciating the legal aspect i.e., the quit notice under Ex.A2, given by plaintiff No.1, is not a valid notice as per Section 106 of the Transfer of Property Act (for short, 'the Act'). Learned counsel further argued that the Civil Court has no jurisdiction to try the same and only the Rent Controller Court has got jurisdiction and that the co-owner of property not issued the quit notice and therefore, the notice issued by the plaintiffs under Section 106 of the Act is illegal and void and prayed the Court to allow the Second Appeal by admitting the same. Learned counsel for the appellant-defendant relied on the decision of the Allahabad High Court in **Jamir Ahmad v. Madhawanand**¹, the relevant paragraphs of the said decision relied on by the counsel are given hereunder:

6. In the present case, the notice does not purport to be on behalf of all the co-owners. Parmananad, one of the persons who instructed the counsel to serve the defendant-appellant with a notice under Section 106 of the T.P.Act alone has entered the witness box. He does not state a word about all the co-lessors having instructed the counsel to serve the notice. In these circumstances, it must be held that the notice was not served upon the defendant-appellant on behalf of all the three plaintiff-respondents. Consequently, it must also be held that the tenancy of the defendant-appellant was not validly terminated.

¹ AIR 1979 ALLAHABAD 104

7. Learned counsel for the plaintiff-respondents has, however, urged that inasmuch as two plaintiff-respondents on whose behalf the notice was sent, were landlords within the meaning of that term in U. P. Act No.III of 1947, the notice of demand and termination of tenancy of their behalf alone was sufficient to validly terminate the tenancy of the appellant. As far as the demand for the arrears of rent is concerned, the submission could be valid. However, a notice under Section 106 of the T. P. Act has to be on behalf of the entire body of lessors. The validity of the notice in the instant case may be upheld only in so far as it relates to the demand of the arrears of rent but as far as it proceeds also to terminate the tenancy of the defendant-appellant, it cannot be sustained.

Learned counsel for the appellant-defendant also relied on the decision of the Andhra Pradesh High Court in **The Metal Press Works Limited, Calcutta v. Guntur Merchants Cotton Press Company Limited**², the relevant paragraphs of the said decision relied on by the counsel are given hereunder:

35. In view of our answer to question No.1 the plaintiff-respondent cannot successfully eject the defendant-lessee unless it establishes that it has issued a valid quit notice giving six months' time as contemplated by Section 106 of the Act, or that the defendant has waived its right for the issuance of such quit notice. The onus of proving that the defendant has waived its right to a valid quit notice is on the plaintiff who asserts the same. The validity or legality of quit notice is not a mere technical plea. The respondent, on appraisal of the material on record, has to establish that there was a valid quit notice.

Waiver being a conscious factor, it must be established that the appellant, being fully conscious of its right to waive has voluntarily given it up. The failure or omission on the part of the lessee to reply to the defective quit notice Ex. A-1 is not, in our considered opinion, a valid ground to constitute or infer waiver on the part of

² AIR 1976 ANDHRA PRADESH 205 (1)

the lessee. The lessee can as well ignore a defective or invalid notice. He is not estopped from pleading in court after the filing of the suit that no proper and valid notice was given. He is not of only not estopped from raising such a plea but he is also under no duty to the plaintiff to point out this error. A party-defendant might, due to negligence or inadvertence, have failed to raise the plea of the defective notice at an earlier stage, but his negligence or omission in that regard cannot give rise to an estoppel unless there is statutory duty of care and obligation on him to send reply to the notice. See **Vellayan v. Madras Province** [AIR 1947 PC 197]. Even otherwise, the omission on the part of the lessee to reply to the notice Ex. A-1 cannot form a basis for inferring waiver.

10. On the other hand, a learned counsel for the respondents-plaintiffs argued that the plaintiffs issued a notice dated 19.06.2010 under Section 106 of the Act to the appellant-defendant terminating the tenancy by 31.07.2010 and the said notice is a valid notice and the appellant-defendant at no point of time objected the invalidity or infirmity of notice specifically at the earliest point of time, and further he never questioned the validity of notice by raising a plea in the written statement; first time such contention was raised in the lower appellate Court and both the Courts below have rightly held that the plaintiffs have given notice under Section 106 of the Act and the said notice is a valid notice and therefore, there is no substantial question of law involved in this appeal, as required under Section 100 C.P.C., and on that ground alone the present appeal is liable to be dismissed. Learned counsel further argued that the appellant-defendant

already purchased a property in the year 2013 under a registered document and shifted his family to the said premises and kept the suit schedule property under his possession. The said aspect was admitted by the appellant-defendant in E.P. proceedings before the trial Court. Learned counsel further argued that the Civil Court has got jurisdiction to decide the case, as the appellant-defendant already filed the Rent Control case in R.C.C. No.26 of 2010 and the same was dismissed stating that the Rent Controller Court has no jurisdiction, which was confirmed by the Principal Rent Controller, Guntur in R.C.A.No.2 of 2013 and therefore, the appellant-defendant cannot raise those pleas in the Second Appeal. Learned counsel finally argued that both the Courts below have concurrently held that the quit notice issued by the plaintiffs under Section 106 of the Act is a valid notice and the plaintiffs have given one month time to the appellant-defendant to vacate the premises and therefore, the appellant-defendant failed to prove that there exists a substantial question of law in this appeal and prayed the Court to dismiss the same. Learned counsel for the respondents-plaintiffs relied on the decision of the Supreme Court in **Parwati Bai v. Radhika**³, the relevant paragraph of the said decision relied on by the counsel is given hereunder:

³ AIR 2003 SC 3995

6. The singular question to be examined in the present case is whether the tenancy was terminated in accordance with the provisions of Section 106 of the Transfer of Property Act. The receipt of notice by the defendant is admitted in the written statement. The defendant has not raised any specific objection as to the validity of the notice. An objection as to invalidity or infirmity of notice under Section 106 T.P. Act should be raised specifically and at the earliest; else it will be deemed to have been waived even if there exists one. It cannot, therefore, be said that the notice in the present case suffered from any infirmity. A copy of the notice was exhibited and proved by the plaintiff as Exh.P-4.

Learned counsel for the respondents-plaintiffs also relied on the decision of the Andhra Pradesh High Court in **Dr. Chiranjeevi Kolluri, Zen Vocational Junior College, rep. by its Chairman Dr. Chiranjeevi Kolluri and Maryam Jamila v. K.Chandra Mohan Reddy**⁴, the relevant paragraphs of the said decision relied on by the counsel are given hereunder:

13. Thus, it is clear that the defendants had understood that Ex.A.1 notice is intended to terminate the tenancy in their favour. That being so, the question that requires consideration is whether the absence of specific expression in Ex.A.1 notice that “the tenancy is terminated” had rendered the said notice invalid.

14. At the outset, it is to be noticed that the defendants in Ex.A.2 reply notice failed to raise any objection as to the validity of Ex.A.1 quit notice. As held in **Parwati Bai Vs. Radhika** [MANU/SC/0372/2003 : 2003 (12) SCC 551] an objection as to invalidity or infirmity of notice under Section 106 of the Transfer of Property Act should be raised specifically and at the earliest; else it will be deemed to have been waived even if there exists one. Therefore, Ex.A.1 quit notice in the present case cannot be held to have suffered from infirmity merely on the ground that it did not expressly mention that the tenancy is terminated.

⁴ 2014 (3) ALD 485

19. For the aforesaid reasons, the contention of the learned counsel for the appellants that there was no valid termination of tenancy is untenable.

20. Accordingly, the judgments and decrees of the Courts below cannot be held to be erroneous and therefore the Second Appeal is liable to be dismissed.

22. However, in the facts and circumstances of the case the appellants are hereby granted time till 31.05.2014 for vacating the suit schedule premises and handing over the vacant possession to the plaintiff subject to the condition of filing an undertaking to that effect before the trial Court on or before 31.01.2014.

11. From the submissions of both sides, the point that arises for consideration in this appeal is whether there is any substantial question of law involved in this appeal.

12. **POINT:**

A perusal of the pleadings and evidence produced by both sides would show that there is no dispute that the respondents-plaintiffs are the absolute owners of the suit schedule property and the said property was leased out to the appellant-defendant in the year 2006 on a monthly rent of Rs.2,500/- and later it was enhanced to Rs.3,500/-. It is also an admitted fact that the appellant-defendant filed R.C.No.26 of 2010 for deposit of rents and the same was dismissed. Against which, the appellant-defendant filed an appeal in R.C.A.No.2 of 2013 and the same was also dismissed. R.C.No.26 of 2010 was dismissed with an observation that the suit property was constructed in the year 2002 and in view of Section 32(b) of the Rent Control

Act, the provisions of the Rent Control Act are inapplicable to the suit property, and those findings became final. It is an admitted fact that plaintiff No.1 gave reply under Ex.A2, but not by both the plaintiffs. The main thrust of the appellant-defendant is that plaintiff No.2 has not issued notice under Section 106 of the Act to the appellant-defendant and therefore, the notice issued under Ex.A2 is defective. The said point raised by the appellant-defendant cannot be considered, as there is no *inter se* dispute between plaintiff No.1 and plaintiff No.2. Regarding the suit schedule property, both the plaintiffs are co-owners and plaintiff No.1, being the husband and co-owner of the suit schedule property, issued Ex.A2 notice. Though during the course of arguments, learned counsel for the appellant-defendant contended that both the plaintiffs had not issued Ex.A2-quit notice under Section 106 of the Act and only plaintiff No.1 issued the said notice, and hence, it is a defective notice, the said aspect was not raised by the appellant-defendant at the earliest point of time. Therefore, the Apex Court rightly held in the case of **Parwati Bai's** case (Supra 3).

13. After considering the pleadings and evidence, both the Courts below have categorically held that the appellant-defendant through his pleadings and evidence never

challenged that the quit notice issued by the plaintiffs are not valid as per law. Further, both the Courts below have concurrently held that in the quit notice the plaintiffs have given one month time to the appellant-defendant to vacate the premises and the said notice is binding on the appellant-defendant and the appellant-defendant is liable to vacate the premises. Both the Courts below, after considering the evidence, have rightly held that the plaintiffs proved that the quit notice-Ex.A2 issued under Section 106 of the Act demanding the appellant-defendant to vacate the schedule property is valid and directed the appellant-defendant to handover the vacant possession of the schedule property to the plaintiffs. Admittedly, in pursuance of the decree the appellant-defendant has not handed over the premises and hence, the respondents-plaintiffs filed E.P.No.158 of 2016 before the trial Court and the delivery of possession was ordered on 03.12.2016.

14. Basing on the judgment of the Apex Court, the lower appellate Court rightly held that an objection as to the invalidity or infirmity of notice under Section 106 of the Act should be raised by the defendant specifically at the earliest point of time. In the present case, the trial Court rightly observed that the appellant-defendant has never made any challenge to the notice in his pleadings and as well as in

the evidence and therefore, both the Courts have concurrently held that the notice under Section 106 of the Act issued by plaintiff No.1 is valid and binding on the appellant-defendant and rightly decreed the suit in favour of the plaintiffs-respondents evicting the appellant-defendant from the suit premises.

15. For the aforesaid reasons, the contention of appellant-defendant that there is no valid termination of tenancy is untenable. Accordingly, the judgments and decree of both the Courts below cannot be held to be erroneous and therefore, the Second Appeal is liable to be dismissed at the admission stage. However, in the facts and circumstances of the case, the appellant-defendant is hereby granted time till 03.02.2017 for vacating the schedule premises and handing over the vacant possession to the respondents-plaintiffs.

Accordingly, this Second Appeal is dismissed at the admission stage. No order as to costs. Miscellaneous Petitions, if any, pending shall stand closed.

25.01.2017
MVA

ANIS, J